Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. .....

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

Appellant appeals from the final order of the Missouri Court of Appeals, Kansas City District, dismissing the appeal of appellant, entered on March 3, 1975. On March 31, 1975 the Missouri Court of Appeals, Kansas City District, overruled appellant's timely filed Motion for Rehearing and Transfer to the Supreme Court of Missouri. Thereafter, the Supreme Court of Missouri, on May 12, 1975, denied appellant's timely filed application to transfer said cause to the Supreme Court of Missouri from the Missouri Court of Appeals, Kansas City District.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Kansas City District, is set forth at Appendix A to this Statement.

JURISDICTION

This is a suit for divorce brought originally in the Circuit Court of Jackson County, Missouri by Appellee, Nadine Godsy. During this proceeding the Trial Court entered a default judgment against appellant in the total amount of $100,000 alimony in gross, of $110,352.00 in the form of permanent alimony, attorney's fees, suit money, in addition to One Hundred Fifty Dollars per week child support. The default judgment was taken against appellant without appellant ever having been notified to appear for a hearing on the divorce matter (it is contested whether he had been notified as to whether there was to be a hearing on the matters relating to temporary support), and without appellant or his counsel being present at the hearing wherein the default judgment was taken. A Notice of Appeal to this Court was filed in the Missouri Court of Appeals, Kansas City District on July 28, 1975, said Court being the Court wherein the Court is possessed of the Record, all pursuant to Rule 10 of the Rules of this Court. A copy of the Notice of Appeal to the Missouri Court of Appeals, Kansas City District is attached to this Jurisdictional Statement as Appendix B.[1] The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2). Cases which sustain the jurisdiction of this Court include *Dohnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282 (1921); *Fiske* v. *Kansas,* 274 U.S. 380 (1927); *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313 (1930); *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill,* 281 U.S. 673 (1930); *Railway Express Agency* v. *Virginia,* 336 U.S. 106 (1949); *Lathrop* v. *Donohue,* 367 U.S. 106 (1961).

1. A timely Notice of Appeal was also filed with the Supreme Court of Missouri on or about July 29, 1975, should this Court determine under its Rules that this Court is the Court "possessed of the Record".

Alternatively, should this Court determine that an appeal does not lie under 28 U.S.C. 1257(2), appellant respectfully moves this Court to treat this Jurisdictional Statement as a Petition for Certiorari. 28 U.S.C. 2103. Cases which sustain this alternative procedure are *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Slagle* v. *Ohio,* 366 U.S. 259 (1961).

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

1. Whether Missouri Court of Appeals, Kansas City District, Rule F.01 as applied to this appellant by said Court denied appellant due process of law when appellant's cause on appeal was dismissed by the Court without notice to appellant, without argument or briefs by either party and without opportunity to supplement the record as to this issue, all in violation of appellant's rights under the Fourteenth Amendment to the United States Constitution. *E.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* ..... U.S. ....., 95 S.Ct. 719, 42 L.Ed.2d ....., ... (1975); *Goss* v. *Lopez,* ..... U.S. ....., 95 S.Ct. 729, 42 L.Ed.2d .....; *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556; *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90; *Baldwin* v. *Hale,* 1 Wall. 223, 233.

2. Whether appellant was denied due process of law when, without notice, without opportunity to be heard, and without the opportunity to be present and to be represented by counsel, the Court, apparently pursuant to Rule 61.01, Missouri Rules of Civil Procedure (which has no provision to give notice to a party), entered a default judgment against appellant in an amount exceeding $110,000.

STATE STATUTORY PROVISIONS INVOLVED

Rule F.01 of the Rules of the Missouri Court of Appeals, Kansas City District, and Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri, which are set forth verbatim at Appendix C to this Statement.

STATEMENT

This appeal stems originally from an action brought initially against appellant in the Circuit Court of Jackson County, Missouri for divorce.

After the matter pended for a time appellee noticed up appellant for a hearing on February 15, 1973 with respect to certain motions for temporary support and the like which were pending in the case. There was no notice to appellant that the matter of the divorce itself would be taken up. Appellant's then counsel was to be out of town, so notified the appellee's attorney, and notified appellant not to be present. An associate lawyer of appellant's then attorney appeared on February 15, 1973 before the Trial Court, applied for a continuance on behalf of appellant. The application for continuance was denied (Tr. pp. 7-8).[2] The Court then and there—without notice to appellant or his counsel and in fact without appellant or his counsel even being present—struck appellant's pleadings and ordered a default hearing on the *divorce* to proceed immediately. Thereupon appellee obtained the divorce, a judgment for over $110,000 in attorney fees, suit money and alimony, and custody of the minor child, together with child support (Tr. pp. 59-60; 12).

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2. References Tr. are to the Trial Transcript.

On appeal, the parties briefed the substantive issues, and no issue was made whether the Appeals Court (Missouri Court of Appeals, Kansas City District) had jurisdiction. At oral argument appellee's counsel—for the first time—raised the issue that the *transcript* did not show that the Notice of Appeal had been filed in time, *viz.*, whether the Notice had been filed within 10 days after the date of overruling the motion for new trial. Counsel for appellant supplemented the record only as to that issue—whether the Notice had been filed within 10 days after the new trial motion had been overruled. Thereafter, the Court of Appeals dismissed appellant's appeal for lack of jurisdiction on another issue which had never been briefed or argued, and with no opportunity for appellant to show the Appeals Court that the actual record below (prepared by trial counsel against whom the default judgment had been taken and who had been subsequently discharged from representing appellant) reflected that the appeal had been properly perfected. The Appeals Court's Rule—F.01—provided that prior to dismissal the Court was required to give notice to appellant, but no notice was given in this case. A timely Motion for Rehearing and for Transfer to the Supreme Court of Missouri was made to the Kansas City Appeals Court on March 18, 1975 and denied on March 31, 1975. Thereafter, appellant made a timely Motion for Transfer to the Supreme Court of Missouri which was denied on May 12, 1975.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented are substantial and of broad public importance. They involve the fundamental guarantee of due process as provided by the Fourteenth Amendment to the United States Constitution and touch upon the rights of litigants everywhere. Most importantly, the

questions involved here touch upon the financial livelihood of this appellant, now facing financial ruin by reason of a judgment of over $110,000 rendered by default against him.

The first question involves the application of a Rule of the Missouri Court of Appeals, Kansas City District, which, as applied to this appellant, denied him his Constitutional rights under the Fourteenth Amendment to the United States Constitution. The second question concerns whether without notice and opportunity to be heard a Court may simply strike a party's pleadings and render a judgment against him in an amount of over $110,000. Under the doctrines as enunciated in *Dohnke-Walker Milling Co.* v. *Bondurant* and *Fiske* v. *Kansas,* cited *supra,* the Court has jurisdiction to hear this appeal. Admittedly, this first issue was not briefed nor argued in the Courts below because appellant had no opportunity to do so. (The second issue was briefed and argued.) *However,* at the first opportunity—namely, both in the Petition for Rehearing and Transfer to the Missouri Court of Appeals, Kansas City District, and in the Application to Transfer to the Supreme Court of Missouri—the issue was raised and denied by those Courts. Where a decision of a State Court has unexpectedly given rise to a federal question that an appellant had no previous opportunity to assert and could not have anticipated, the issue may be raised in the Supreme Court. *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* and *Brinkherhoff-Faris Trust and Savings Co.* v. *Hill,* cited *supra.* Of course, Court orders establishing Rules governing practice in its Court are "statutes" within the meaning of 28 U.S.C. 1257(3). *Lathrop* v. *Donohue,* and *Railway Express Agency* v. *Virginia,* cited *supra.*

Alternatively, appellant respectfully requests that this Court consider the matter as a Petition for Writ of Certiorari should the Court decide an appeal does not lie. 28 U.S.C. 1257(2).

1. It Is a Violation of Appellant's Rights Under the Due Process Clause of the Fourteenth Amendment to the U. S. Constitution to Dismiss His Appeal When No Notice or Opportunity to Be Heard Had Been Given to Appellant or His Counsel Prior to Such Dismissal.

Rule F.01, of the Special Rules of the Missouri Court of Appeals, provides that—as to "Dismissals of Appeals in Civil Cases"—when for any violation of its "Rules an appeal is to be dismissed, reasonable notice will be given the parties by notice to the responsible attorney . . ." (Appendix C). No notice was given appellant prior to such dismissal—apparently the Court deemed such rule not to apply in this situation.

However, before one's rights or property is taken from him, due process requires a hearing prior to the seizure and forfeiture. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.,* ..... U.S. ....., 95 S.Ct. 719, 42 L.Ed.2d .....; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406; *Goss* v. *Lopez,* ..... U.S. ....., 95 S.Ct. 729, 42 L.Ed.2d .....; *Bell* v. *Burson,* 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90.

The Fourteenth Amendment requires notice and the opportunity for a hearing before one's interest in any type of property is taken away. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 1 Wall. 223, 233.

This right to be heard insures fair play to the indivual and protects his use and possession of property from arbitrary encroachment, minimizing unfair or mistaken

deprivations of property. "(T)he prohibition against deprivation of property without due process of law reflects the high value, imbedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of government interference." See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 551.

"The requirement of notice and an opportunity to be heard raises no inpenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State will listen to what he has to say, substantially unfair and simply mistaken deprivations of property interests can be prevented." *Fuentes* v. *Shevin,* 407 U.S. 67, 81.

And, the notice must be sufficient to offer the party subject to deprivation the opportunity to be heard, to prevent any unfair or mistaken deprivations of property. "Due process is afforded only by the kinds of notice and hearing that are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor before he can be deprived of his property . . . ." *Fuentes, supra,* citing cases.

Here, it is respectfully submitted, had the Court given proper notice the record from a factual point of view could have been corrected and the appellant could have shown the Court it had jurisdiction. A key finding of the Appellate Court was that the Trial Court's setting aside of its earlier default judgment was not timely and was therefore ineffective. (It is important to note that in this Appellate Court only a transcript—and not the entire Trial Court file—is prepared and thus the Appellate Court does not necessarily have the entire record before

it. It did not in this case, it is respectfully urged.) If appellant had been given proper opportunity to meet this issue, he would have shown (as more particularly set out in his various motions for transfer and rehearing) that, in fact, the Trial Court had jurisdiction to set aside its prior order. (Appellant's Motion for Rehearing or Transfer made to the Missouri Court of Appeals, Kansas City District, is attached to this Statement as Appendix D.) The same allegations were made in the application to transfer to the Missouri Supreme Court. From a strictly legal point of view, if appellant had been given proper opportunity to be heard, he could have pointed out to the Court that, under Missouri law, Section 452.070, Missouri Revised Statutes, a Court may modify a divorce judgment at any time and therefore the appeal was timely.

2. It Was a Violation of Appellant's Rights Under the Fourteenth Amendment to the United States Constitution for the Trial Court to Apply the Provisions of Rule 61.01, Rules of the Supreme Court of Missouri, Which Has No Provision for Notice and Hearing, So As to Strike Appellant's Pleadings and to Render a Default Judgment Against Him in an Amount Exceeding $110,000.00.

Rule 61.01 of the Rules of the Supreme Court of Missouri (in effect on the date of default, February 15, 1973), as more particularly set out in Appendix C, does provide that a Court may strike the pleadings of a party if a party does not make proper discovery. 61.01(b)(3) and 61.01(d). However, no notice that such an action would be taken was even given the appellant. (There was a motion to strike the pleadings on file based upon failure to pay child support—but there is no provision in Missouri law for this. In any event, this particular motion was not noticed up on the date in question as only "Motions

to Modify" were to be heard on February 15, 1973.) Moreover, there was never any allegation that appellant had not made discovery. Under all of these facts, including application of a facially unconstitutional statute, appellant was denied due process of law. The cases cited *supra* on the requirement of adequate notice and an adequate hearing with counsel are applicable here. As was said in *Krieber* v. *Krieber,* 420 S.W.2d 376 at p. 379:

> "Notice and a hearing, or an opportunity to be heard, have long been considered essential to due process, to a decision on the merits of a cause and to the deprivation of rights and property."

Finally, the Appellate Court had jurisdiction to hear this case as outlined above in the discussion of Question 1. If Missouri law is properly applied to this cause, appellant's notice of appeal was timely. This Court may properly take jurisdiction of this matter and should overturn this $110,000.00 default judgment.

In conclusion, each of the Questions presented is so substantial as to require plenary consideration, with brief on the merits and oral argument, for their resolution.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

NADINE GODSY,
Plaintiff,

vs.

SHERMAN M. GODSY, JR.,
Defendant.

Juvenile & Domestic Relations
Division No. 8
Circuit Court No. 749,413

Judgment Entry and Decree of Divorce

Comes now on this 15th day of February, 1973, the plaintiff by and through her attorneys', Frank S. Krenzky and James R. Hunsucker and the defendant by his attorneys' Jones & McDaniel, and Jack Sims, appearing before the Court and the Defendant by his attorney requested a continuance in the above styled matter. After an oral hearing in which the defendant by his attorney and the Plaintiff by her attorneys were heard, the Court refused to grant a continuance and ordered this matter for trial.

This cause having come on for a hearing and being submitted to the Court, and all evidence heard and being advised the premises, the Court disposed of preliminary motions now pending in this matter.

1. The motion of James R. Hunsucker, for attorney's fees was sustained by the evidence introduced. James R.

Hunsucker was granted an attorney's fee in the amount of $4,320.00.

2. Defendant's motion to cite Plaintiff for contempt was denied and Defendant's Motion to Modify Custody also denied.

3. Motion for Contempt against the Defendant filed by the Plaintiff is considered moot and dismissed.

4. Plaintiff's Motion for Additional Temporary Alimony and Child Support is considered moot and dismissed.

5. Plaintiff's Motion to Strike Defendant's Pleading is sustained.

Evidence was heard on the Plaintiff's petition for a decree of Divorce and the Court after hearing the evidence and being satisfied that the Plaintiff was the innocent and injured party and was entitled to the relief prayed for in plaintiff's petition. ORDERS, ADJUDGES AND DECREES that plaintiff be and hereby is absolutely and forever divorced from the bonds of matrimony existing between the Plaintiff and Defendant. That plaintiff be awarded the care, control and custody of Gary S. Godsy, age (7) years the minor child born of the marriage. That the defendant is ordered to pay child support in behalf of the said minor child to the plaintiff in the sum of $150.00 per week; that the Defendant is ordered to pay the Plaintiff the sum of $100,000.00 alimony in gross; that the plaintiff is awarded attorney's fees in the amount of $5,-932.00 payable by the defendant; that the plaintiff is awarded suit money in the amount of $100.00 payable by the defendant. The defendant is granted privilege of reasonable visitation with Gary S. Godsy, the minor child of the marriage.

That costs be taxed against the defendant and execution shall issue therefore.

Dated this 15th day of February, 1973.

/s/ Lewis W. Clymer
Circuit Court Judge

NO. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Plaintiff-Respondent,

vs.

SHERMAN M. GODSY, Jr.,
Defendant-Appellant.

Opinion of the Missouri Court of Appeals,
Kansas City District

APPEAL FROM THE CIRCUIT COURT
OF JACKSON COUNTY
Honorable Lewis W. Clymer

(Filed March 3, 1975)

BEFORE PRITCHARD, P.J., SWOFFORD, J. and SOMERVILLE, J.

PER CURIAM

This is a divorce action wherein the defendant (husband) seeks to appeal from a judgment entered in favor of the plaintiff (wife).

At the very threshold of appellate review this court is faced with a primal question of profound and possibly

conclusive significance. Does this court have jurisdiction to entertain the husband's "appeal"?

The scope of this court's duty to inquire into and determine its jurisdiction in this case, even though none of the parties have directly questioned the matter, finds clarity of expression in Taney County v. Addington, 296 S.W. 2d 129, 129[1] (Mo. App. 1956):

> "Appellate jurisdiction may not be conferred by waiver, acquiescence or even express consent [Collier v. Smith, Mo. App., 292 S.W. 2d 627, 630(4), and cases cited in footnote 8; Bowman v. Phelps County, Mo. App., 36 S.W. 2d 414 (3)]; and, although (as in the instant proceeding) none of the parties have questioned our appellate jurisdiction, it becomes our initial duty in each case to inquire into and determine our jurisdiction, sua sponte. Perkins v. Burks, Mo., 61 S.W. 2d 756, 757(1); State ex rel. and to Use of Hickory County v. Davis, Mo. App., 292 S.W. 2d 322 (1); Fort Osage Drainage Dist. of Jackson County v. Jackson County, Mo. App., 264 S.W. 2d 792(1)."

With the above admonition in mind, certain salient controlling events bearing upon determination of this court's jurisdiction are hereafter chronologized. The judgment appealed from was entered by the trial court on *February 15, 1973*. The husband filed a timely motion for a new trial on *February 28, 1973* . On *March 16*, 1973, the trial court overruled the husband's motion for a new trial. The trial court, on its own motion, on *March 26, 1973*, vacated its order of March 16, 1973, overruling the husband's motion for a new trial. Thereafter, on *May 29, 1973*, the trial court again overruled the husband's motion for a new trial. The husband filed his notice of appeal in the trial court on *June 6, 1973*. The husband

at no time ever sought a special order from this court to appeal from the judgment complained of as provided in Rule 81.07(a) and the time to do so thereunder has long since expired.

The above events, and their sequence, are strikingly similar to those in Bank of Thayer v. Kuebler, et al, 219 S.W. 2d 297, 298-299 (Mo. App. 1949), an action for "replevin" and "damages", wherein defendants-appellants' "appeal" was dismissed for lack of appellate jurisdiction because they had failed to file their notice of appeal "within the time required by law". Consequently, this court takes the liberty of quoting at length from Bank of Thayer v. Kuebler, et al, supra, and interpolating in the text thereof in brackets, at appropriate places, the dates of corresponding events in this case and Rules of Civil Procedure (substantively the same as those portions of the code sections and statutes cited and relied on therein) prevailing at the time of the corresponding events:

> "[T]here are certain positive limitations in the provisions of the Code beyond which no court is authorized to extend its discretion. One of these is that the court 'may not enlarge the period for filing a motion for or granting a new trial, or for commencing an action or taking an appeal as provided by this code.' Code, Sec. 6(b), Mo. R.S.A. §847.6(b) [Rule 44.01(b)]. Another is that no appeal is effective without a notice of appeal, filed either within ten days after the judgment becomes final, Code, Sec. 129, Mo. R.S.A. §847.129 [Rule 81.04], or within six months after the judgment has become final, under special order of the appellate courts on application, Code, Sec. 130, Mo. R.S.A. §847.130 [Rule 81.07(a)]. Without timely notice of appeal under one or the other of such sections the appellate court acquires no jurisdiction.

"[3, 4] However, appellants contend that they did file a proper notice of appeal, and that the same was timely. The matter requires our careful consideration of each step taken and its nature, time and effect. It must be conceded that defendants' motion for new trial filed November 29, 1947 [February 28, 1973], was proper and timely since the judgment was entered November 19, 1947 [February 15, 1973]. By the timely filing of such motion the finality of the judgment was suspended. When, within 90 days after the motion for new trial was filed, the court disposed of it by overruling it (February 7, 1948) [March 16, 1973], the judgment then became final, Code, Sec. 116, Mo. R.S.A. §847.116; Rules of Supreme Court, Rule 3.24 [Rule 81.05(a)]. Thereafter the court had no further authority to disturb the judgment or its finality. The 30 day period following the date of the judgment during which the court had control of the judgment had expired. Rules of Supreme Court, rule 3.25 [Rule 75.01]. The court term is no longer considered in computation of time in such matters under the new Code, Code, Sec. 6(c), Mo. R.S.A. §847.6(c) [Rule 44.01(c)]. The 90-day period from the date the motion for new trial was filed, at the expiration of which the motion, if not yet disposed of, is deemed overruled and the judgment thereby becomes final, does not apply here because the motion was overruled by the court within that period, Code, Sec. 118, M.R.S.A. §847.118; Rules of Supreme Court, rule 3.24 [Rule 81.05(a)].

"Hence, the order of the court on February 26, 1948 [March 26, 1973], setting aside its previous order of February 7, 1948 [March 16, 1973], overruling the motion for new trial, and entering a new order as of February 26, 1948 [May 29, 1973], overruling that motion, was without jurisdiction and is null and void. As was said in Camden

v. St. Louis Public Service Co., 239 Mo. App. 1199, 206 S.W. 2d 699, 703: 'We know of no lawful method which would authorize the trial court to "hold in abeyance" the judgment which had become final.' It follows that the notice of appeal filed March 3, 1948 [June 6, 1973], from a judgment that had become final February 7, 1948 [March 16, 1973], was not filed within ten days after the judgment became final and was, therefore, too late, Code, Sec. 129, Mo. R.S.A. §847.129 [Rule 81.04]. Neither the trial court nor this court has power to enlarge that period under that section, Code, Sec. 6(b), Mo. R.S.A. §847.6(b) [Rule 44.01(b)]. Woods et al v. Cantrell, 356 Mo. 194, 201 S.W. 2d 311; Camden v. St. Louis Public Service Co., 239 Mo. App. 1199, 206 S.W. 2d 699, 703; Gockel v. Jenkins, Mo. App., 210 S.W. 2d 691; McPike v. St. Louis County Bank, Mo. App., 193 S.W. 2d 961; Rosbrugh v. Motley, et al., Mo. App., 216 S.W. 2d 165, 170."

For the reasons stated in Bank of Thayer v. Kuebler, et al, supra, and the Rules of Civil Procedure interpolated therein, the husband's notice of appeal in this case was not filed within the required time and therefore this court has no jurisdiction to entertain his "appeal".

In spite of a natural inclination otherwise, nothing is to be gained by lamenting at length about the harsh result effected by this decision. The question of whether jurisdiction is lodged in this court, in view of the facts presented by the record, is controlled by settled principles of law and Rules of Civil Procedure which this court is not at liberty to ignore or evade.

Appellant-husband's "appeal" must be and is hereby dismissed.

All concur.

APPENDIX B

No. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Respondent,

vs.

SHERMAN M. GODSY, JR.
Appellant.

Notice of Appeal to Supreme Court of the United States

(Filed July 28, 1975)

Notice is given that Appellant appeals from the judgment entered in this action on the 3rd day of March, 1975, from the Order of this Court on March 31, 1975 overruling Appellant's Motion for Rehearing and Transfer, and the Order of the Supreme Court of Missouri denying Appellant's Application to Transfer on May 12, 1975, all in accordance with Rule 10, Rules of the Supreme Court of the United States.

The party taking the Appeal is Appellant, Sherman Godsy. All of the judgment entered in this cause on March 3, 1975, as well as the subsequent Orders overruling Motions for Rehearing and Transfer, are appealed from. Appellant takes that Appeal pursuant to 28 USC 1257(2) and 28 USC 2101(c).

Original Signed by James R. Wyrsch
James R. Wyrsch
Attorney for Appellant
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

Dated this 28th day of July, 1975.

Copy of the above and foregoing Notice of Appeal delivered on this 28th day of July, 1975, to: THAINE Q. BLUMER, 2010 Traders National Bank Building, Kansas City, Missouri, Attorney for Respondent.

Original Signed by James R. Wyrsch
Attorney for Appellant

APPENDIX C

Rule F.01, Missouri Court of Appeals, Kansas City District

Rule F.01 Dismissal of Appeal in Civil Cases

In civil cases, no formal dismissal docket will be published. When, for any violation of the Rules, an appeal is to be dismissed, reasonable notice will be given the parties by notice to the responsible attorney, and the appeal will then be dismissed by order, absent leave to remedy the defect or failure granted upon good cause shown. Criminal cases will be dismissed in accord with Rule 28.09. (Adopted Nov. 1, 1973, effective Jan. 1, 1974.)

Rule 61.01, Rules of Civil Procedure, Supreme Court of Missouri

RULE 61. ENFORCEMENT OF DISCOVERY BY PARTIES

61.01 Motion for Order Compelling Discovery

(a) Motion to Compel Answer—Costs of. Upon the refusal of a party to answer any interrogatory submitted under Rule 56, the proponent of the question may move

the court, on reasonable notice to all persons affected thereby, for an order compelling an answer. If the motion is granted and if the court finds that the refusal was without substantial justification, the court shall require the refusing party to pay to the examining party the amount of the court costs incurred in obtaining the order. If the motion is denied and if the court finds that the motion was made without substantial justification, the court shall require the examining party to pay to the refusing party the amount of the court costs incurred in opposing the motion.

(b) Refusal to Obey—Consequences of. If any party, or if an officer, director, general manager, managing agent or partner thereof refuses to obey any order made under paragraph (a) of this Rule requiring him to answer designated questions, or an order made under Rule 58 to produce any document or other thing for inspection, copying or photographing, or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 60, requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(1) An order that the matters regarding which the questions were asked or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party or any other designated facts shall be taken to be established for the purpose of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence

designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(3) An order striking out pleadings or parts thereof, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

(c) Refusal to Make Admission—Consequences of. If a party, after being served with a request under Rule 59 to admit the genuineness of any relevant documents or the truth of any relevant and material matters of fact, files and serves a written sworn denial thereof and if the party requesting the admissions thereafter proves the genuineness of any such document or the truth of any such matter of fact, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making such proof. Unless the court finds that there were good reasons for the denial or that the admissions sought were of no substantial importance, the order shall be made.

(d) Willful Failure to Appear—Consequences of. If a party, or if the party served is a public or private corporation, a partnership or other unincorporated association, an officer, director, general manager or managing agent or partner thereof, willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to return answers to interrogatories submitted under Rule 56, after proper service of such interrogatories, the court on motion and notice may strike out all or part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.
(Amended March 6, 1962, eff. Oct. 1, 1962.)

APPENDIX D

No. KCD 26,808

IN THE MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

NADINE GODSY,
Plaintiff-Respondent,

vs.

SHERMAN M. GODSY, JR.,
Defendant-Appellant.

Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court

(Filed March 18, 1975)

Appellant moves this honorable court for rehearing in the above cause or to transfer said cause to the Supreme Court of Missouri on the following grounds:

1. The court entered an order on March 3, 1975 dismissing this appeal. However, Rule F.01 provides that reasonable notice be given the parties prior to the dismissal. There was no notice given in this case and this court should set the matter for rehearing.

2. The court in its opinion inadvertently misinterpreted and overlooked certain facts concerning this matter. Appellant would respectfully request that in the alternative, this case be remanded for further findings of facts and conclusions of law at the trial court level. Specifically:

(a) The order entered by Judge Clymer on March 16, 1973 overruling the motion for new trial was not in effect a final judgment. A final judgment is final only when all of the rights of the parties

in the action have been determined. When defendant filed his motion for new trial on February 28, 1973, he incorporated in Point I the fact that the court had erred in failing to sustain defendant's motion to set aside the default judgment. A copy of the motion to set aside default judgment (filed February 23, 1973) is attached hereto. Appellant conceded that this motion was not a part of the transcript on appeal. Appellant, however, wishes the court to consider it because of the harsh consequences of the dismissal on appeal, together with the fact that neither party argued the specific point which prompted this court to enter a dismissal of the appeal. The court's order of March 16, 1973 simply states that the motion for new trial is overruled. However, incorporated in said motion was the motion to set aside the default judgment. In *Herndon* v. *Ford*, 470 S.W.2d 168 (App. 1971), a naked record recital that a motion for directed verdict was sustained did not constitute a final judgment. Since the court's overruling the motion for new trial did not rule on grounds in connection with the motion for new trial, it was not a final judgment which was appealable.

(b) Defendant again urges the court to remand to the trial court for further findings of fact and conclusions of law. However, the appellant can tell the court that his examination of the original file of this cause shows that a journal entry was not prepared until sometime after March 15, 1973. The journal entry that does appear shows on its face a alimony judgment $100.00 and further shows an additional entry not contained in the original entry (Tr. pp. 59-60), namely, that the motion for additional temporary child support and alimony was overruled as moot. The file clearly shows that this journal entry

was not prepared and filed until at least March 15, 1973, even though it is dated February 15, 1973. Again, there is nothing in the record at this point to show the court these facts, but the court may rehear the matter and order an additional supplemental transcript to be prepared in connection with this matter. In *Aronberg* v. *Aronberg*, 316 S.W.2d 675, the court stated:

"The important principle to remember in determining the court's authority to correct its records is that it can only correct the record so as to reflect the action actually taken by the court at the time it entered its order or judgment. A nunc pro tunc entry can only be employed to correct a clerical mistake or misprision of the clerk. Such an entry cannot be invoked to correct a mistake or oversight of the judge, nor be used to correct judicial errors, nor to render a judgment different from that actually rendered, even though the judgment actually rendered was not the judgment the judge intended to render. *Wiggins* v. *Perry*, 343 Mo. 40, 119 S.W.2d 839, 126 A.L.R. 949; *Campbell* v. *Spotts*, 331 Mo. 974, 55 S.W.2d 986; *Clancy* v. *Herman C. G. Lyties Realty Co.*, 321 Mo. 282, 10 S.W. 2d 914; *Burnside* v. *Wand*, 170 Mo. 531, 71 S.W. 337, 61 L.R.A. 427; *Arkansas-Missouri Power Company* v. *Hamlin*, Mo.App., 288 S.W.2d 14; *Schenberg* v. *Schenberg*, 307 S.W.2d 697."

Therefore, the facts in this case are that a final judgment was probably not entered until sometime on March 15 or March 16, 1973

(c) The clear provisions of Section 452.070, Missouri Revised Statutes, did permit the court to have in this matter continuing jurisdiction. Section 452.070 provided (at the time of this action) "The court, on

the application of either party, may make such alteration, from time to time, as to the allowance of alimony and maintenance, as may be proper . . . ." Clearly, under this provision Judge Clymer had authority on March 26, 1974 to enter the order that he did.

(d) Rule 74.78 of the Rules of Civil Procedure provides that upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail upon every party affected thereby who is not in default for failure to appeal and who is not in court in person or by attorney at the time of the entry of such order or judgment. Appellant states to the court that his attorney was present and he was therefore entitled to have notice of the journal entry which was prepared by appellee's counsel on March 15 or 16, 1973. Under these provisions, the court has six months from the entry of the order or judgment in which to set aside the order or judgment. No copy of the journal entry was ever furnished to appellant or his counsel. Under this provision, Judge Clymer still had continuing jurisdiction to set aside his earlier order.

(e) This court should enter its order to supplement the transcript to determine exactly what did occur in the trial court and order rehearing of the matter so that a proper determination of this matter can be made.

A. The question involved in this case is of such general interest or importance that the final decision thereon should be made by the Supreme Court of Missouri, and in support thereof appellant states:

1. That the court's holding that a trial court under Section 452.070, Missouri Revised Statutes, could not have

made continuing orders with respect to its prior orders is of general interest or importance.

B. The decision of this court appears to be in direct conflict with the statute.

WHEREFORE, Appellant respectfully requests this Court to grant him a rehearing in this case, or to transfer the cause to the Supreme Court en banc.

Respectfully submitted,

Henry H. Fox, Jr. and James R. Wyrsch
Original Signed by James R. Wyrsch
By James R. Wyrsch
1050 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
Attorneys for Appellant

Copy of the above and foregoing Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court served upon Appellee by delivering same to: THAINE Q. BLUMER, 2010 Traders National Bank Bldg., Kansas City, Missouri, on this 18th day of March, 1975.

Original Signed by James R. Wyrsch
James R. Wyrsch

Order Overruling Motion for Rehearing

MISSOURI COURT OF APPEALS
Kansas City District
10th Floor Jackson County Courthouse
Kansas City, Mo. 64106

Area Code 816
881-3787

March 31, 1975

Mr. John C. Russell
10216 E 72nd
Kansas City, Missouri 64133

In re: Godsy v Godsy
KCD 26808

Dear Sir:

The Court has this day overruled Motion for rehearing and Transfer to the Supreme Court is denied in the above cause.

Yours very truly

/s/ M. L. Thomas
Clerk

18.
cc:

Mr. R.C. Jones, 1103 Grand-Suite 221, K.C. Mo. 64106

Mr. James R. Wyrsch, 1006 Grand-Suite 1050, K.C. Mo. 64106

Mr. Frank R. Krenzky, 620 Argyle Bldg., K.C. Mo. 64106

Mr. Thaine Q. Blumer, 2010 Traders Bldg. 1125 Grand-K.C. Mo. 64106

Order Overruling Motion to Transfer

Supreme Court No. 59057

Court of Appeals No. 26808

IN THE SUPREME COURT OF MISSOURI

May Session 1975

Nadine Godsy,
Respondent,

vs. TRANSFER

Sherman M. Godsy, Jr.,
Appellant.

Now at this day, on consideration of appellant's Application to transfer the above entitled cause from the KANSAS CITY DISTRICT OF THE MISSOURI Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1975, and on the 12th day of May 1975, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 15th day of May 1975.

..... Clerk.

..... D. C.

Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-186

NADINE GODSY,
Appellee,

vs.

SHERMAN M. GODSY, JR.,
Appellant.

APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

MOTION OF APPELLEE NADINE GODSY TO DISMISS

Appellee Nadine Godsy, pursuant to Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal in the above entitled case on the grounds (a) that the appeal does not present a substantial federal question, and (b) that the federal questions sought to be raised were not timely or properly raised or expressly passed on by the courts below.

STATEMENT OF CASE

This case is a divorce action initiated by the appellee in the Circuit Court of Jackson County, Missouri, on July 7, 1971. After nearly one and one-half years of postpone-

ment the case was set for a special hearing on February 15, 1973, at the request of appellant's trial counsel and with the consent of appellee's counsel. The docket notices mailed to both parties by the Circuit Clerk's office mistakenly listed the case under "Motions to Modify"; nonetheless, both counsel for appellant and appellee understood that the hearing was to be a trial on the divorce itself, as set out in the affidavit of appellant's trial counsel filed with the court on February 23, 1973 (Appendix A). The trial record reveals that appellant's trial counsel had been advised *by the court* that the case would be specially set on February 15, 1973 (Appendix B). On the day of the hearing, appellant's counsel was out of town on vacation and had an office associate appear for him to request a continuance. The continuance was denied and the trial court advised the associate counsel as follows: "You can tell the others what we are going to do. The court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here. . ." (Appendix B). Thereafter a hearing on the divorce was held and appellee was granted a divorce, judgment for $110,352.00 in alimony, attorney fees, and suit money, along with child support of $150.00 per week and custody of the minor child (Jurisdictional Statement, Appendix A, pp. 11-12).

Appellant timely filed a Motion for New Trial which was overruled on March 16, 1973, by the trial court (thereby divesting the trial court of jurisdiction under the long-established procedure and rules of Missouri courts), and appellant thereafter filed an untimely Notice of Appeal. Both sides briefed and argued the issues before the Missouri Court of Appeals, Kansas City District, and the appeal was dismissed on March 3, 1975. The Court

of Appeals held that it was without jurisdiction due to appellant's failure to file notice of appeal within the ten-day time limit prescribed by Missouri law (Jurisdictional Statement, Appendix A, p. 13). Appellant now complains that he was not given notice of dismissal by the Court of Appeals and hence was denied due process of law, despite the fact that he was allowed to brief and argue all issues presented by the appeal, and simply chose not to confront the issue of the jurisdictional defect. Motion for Rehearing and for Transfer to the Supreme Court of Missouri was made and denied (Jurisdictional Statement, Appendix D, p. 27). Thereafter, appellant's Application for Transfer to the Supreme Court of Missouri was denied on May 12, 1975 (Jurisdictional Statement, Appendix D, p. 28).

ARGUMENT

There Is No Substantial Federal Question Presented

Appellant seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257 (2), by appeal from the state court, or alternatively, under 28 U.S.C. §1257 (3), by writ of certiorari. In either case the "appeal" must present a substantial federal question, *Cross* v. *Bruning*, 413 F.2d 678 (C.A. 9, 1969); 28 U.S.C.A. §1257 (2) and (3). None is presented here. Briefly stated, the issues raised by appellant are:

1) Whether the failure of the Missouri Court of Appeals to give notice of dismissal denied appellant due process.

2) Whether the Circuit Court denied appellant due process by entering a default judgment without sufficient notice and opportunity to be heard.

It should be noted that appellee does not dispute the fact that appellant had no *special notice* of the dismissal of appeal, but appellee does dispute the factual allegations as presented to this Court by the appellant regarding notice and opportunity to be heard at the trial court. Appellant seeks to claim lack of notice and opportunity to be heard at the divorce trial on the basis of the docket notice which listed this matter for hearing on "Motions to Modify", despite the affidavit of trial counsel for appellant that acknowledges proper notice of *trial*. Appellant had sufficient notice and opportunity to be heard, but, by and through his counsel, simply failed to take advantage of that opportunity.

None of the cases cited by appellant regarding due process compare even remotely to the facts and circumstances presented here. Appellee concurs with the broad statements quoted by appellant in his Jurisdictional Statement regarding the virtue of, and necessity for, notice and opportunity to be heard. In this case however, it was not the lack of procedural safeguards that plagued this appellant; rather it was his own misuse and neglect in adhering to those procedural safeguards that brings appellant to this Court.

I. The Dismissal by the Missouri Court of Appeals Did Not Violate Appellant's Rights Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Appellant, by and through his counsel, briefed and argued this case before the Court of Appeals on issues of his own choosing, yet he now complains because the order of dismissal dealt with another issue. The Court of Appeals, conscious of its own limited grant of authority, decided the case on the threshold question of jurisdiction.

Appellate jurisdiction cannot be conferred upon Missouri courts by any means other than those prescribed by statute, and the courts of Missouri have consistently, and frequently, held that a court must consider jurisdiction of its own volition, and consent of the parties, either express or implied (by failing to argue or raise the issue), cannot create authority which does not exist. *Seiter* v. *Tinsley*, 503 S.W.2d 38 (1973); *Dudeck* v. *Ellis*, 376 S.W.2d 197 (1964); Section 512.020, Missouri Revised Statutes; and Missouri Rules of Civil Procedure 41.02 and 81.01. There being no constitutional (federal or state) right to an appeal, the courts of Missouri can only operate within the confines of their statutory grant of authority. *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); *Byers* v. *Zuspann*, 257 S.W.2d 384 (1953); *Hance* v. *Johnson, Stephens and Shinkle Shoe Co.*, 306 S.W.2d 80 (1957); *Dombroski* v. *Cox*, 431 S.W.2d 680 (1968); Section 512.050, Missouri Revised Statutes. Furthermore, no Missouri court is authorized to enlarge the time for taking an appeal or for filing a motion for a new trial, Missouri Rules of Civil Procedure 44.01(b), 78.04, 81.04; Section 510.340, Missouri Revised Statutes. Taking an appeal requires filing a notice of appeal within ten days after final judgment, Missouri Rules of Civil Procedure 81.04; Section 512.050, Missouri Revised Statutes, or by seeking a special order within six months of final judgment under the procedure set out in Rule 81.07(a); Section 512.060, Missouri Revised Statutes. However, this appellant failed to comply with these procedural rules and thereby precluded the Court of Appeals from ever acquiring jurisdiction.

Appellant, through counsel, was quite familiar with the above-mentioned rules, and as such had, at the very least, constructive notice that his appeal would be dismissed. Appellant contends, however, that the Court of

Appeals denied him due process of law by failing to provide him with a special notice of dismissal. Rule F.01, of the Special Rules of the Missouri Court of Appeals, Kansas City District (there being no similar provision in the Special Rules of the St. Louis or Springfield Districts), provides that a party in violation of the rules may be granted leave "to remedy the defect or failure upon good cause shown" (Jurisdictional Statement, Appendix C, p. 19). The notice provision of the rule is provided since there is no formal dismissal docket published. Appellee has been unable to find any reported decisions construing Rule F.01 (it became effective on January 1, 1974), but it seems obvious that it was intended to exculpate the appellant who erred by filing in an improper form (for example: indexing and typewritten documents), or by omitting necessary documents. Interpreted as such, there *was no violation* of Rule F.01—appellant is apparently trying to stick the proverbial round peg into a square hole. Appellant's violation was such that it would have been impossible for him to "remedy the defect or failure". It is obvious that any further notice (there already having been opportunity to brief and argue the case) would have provided appellant with an opportunity for absolutely nothing. The Court of Appeals had before it all salient dates of filing motions and notice of appeal, leaving it with the simple task of merely counting the days.

The order of dismissal was mandatory, and there were no rights, federal or state, denied this appellant. It is respectfully suggested that it is not for this Court to consider the various theories appellant advanced on Motion for Rehearing and Application to Transfer to the Supreme Court of Missouri. This Court has often held that it will not substitute its interpretation of state procedure for that of the state courts. *Patterson* v. *Alabama,* 294 U.S. 600, 55 S.Ct. 575, 79 L.Ed. 1082 (1934).

Assuming in the alternative, that this Court would decide that a federal question is presented here, the appeal must still fail. The federal courts, like the Missouri courts, restrict the time within which appeal may be taken (Federal Rules of Civil Procedure, Rule 73 (a), and Supreme Court Rules 11 and 13). If it were otherwise, there could be no finality of judgments, no orderly administration of justice, no "definite point of time when litigation shall be at an end," *Matton Steamboat Company* v. *Murphy,* 319 U.S. 412, 63 S.Ct. 1126, 87 L.Ed. 1483 (1943). The judgment appealed from herein rests on independent and adequate state grounds, and there has been no subterfuge to evade a federal question under color of state procedure. *Henry* v. *Mississippi,* 379 U.S. 443, 85 S.Ct. 1322, 14 L.Ed.2d 263 (1965); *Herb* v. *Pitcairn,* 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Patterson* v. *Alabama,* supra; *Monger* v. *Florida,* 405 U.S. 958, 92 S.Ct. 1163, 31 L.Ed.2d 236 (1972), dissenting opinion.

Appellee respectfully suggests that any federal question regarding notice of dismissal as alleged, if even present, is best characterized as frivolous.

II. The Trial Court's Application of Rule 61.01, Missouri Rules of Civil Procedure, Did Not Violate the Rights of Appellant Under the Fourteenth Amendment to the United States Constition, in That Appellant Was Not Denied Notice and Opportunity to Be Heard.

Appellant contends that a substantial federal question is presented because the trial court entered a default judgment without appellant-defendant, or his counsel, being present, and further, that trial counsel was not given notice of the hearing of February 15, 1973. Again, the Court's attention is directed to the affidavit of trial counsel (Ap-

pendix A) wherein he acknowledges notice of a "trial date" on February 15, 1973. In reality, if it were not for a clerical error in listing the case under "Motions to Modify", appellant would be without an excuse of any kind insofar as notice. Trial counsel was fully aware of the trial date, and the *true nature* of that proceeding, and the listing error has simply provided appellant with an after-the-fact opportunity to try and salvage what he can. The Missouri courts did not buy it and neither should this Court.

Appellant appeals this issue under the auspices of Rule 61.01 of the Missouri Rules of Civil Procedure, which authorizes the trial court to strike a party's pleadings and enter a default judgment if that party fails to properly proceed with discovery (Jurisdictional Statement, Appendix C, pp. 19-21). The alleged deficiency of Rule 61.01 is that there is no provision for notice. The absurdity of this reasoning is obvious after an examination of Rule 61.01 - - - the Rule *exists* to provide the trial judge with the authority to take action against a party that, after having ample notice, chooses not to avail himself of his day in court or his opportunity to be heard. A reading of the trial transcript, and particularly the pre-trial conference in chambers with The Honorable Circuit Judge Lewis Clymer, puts the situation in its proper perspective (Appendix B). Petitioner-appellee had been prejudiced by numerous continuances and delays. Judge Clymer, being aware of this, properly exercised his discretion by denying the continuance sought by appellant. Missouri Rule of Civil Procedure 65.01 (Appendix C) provides that the court *may* continue an action until a later date for good cause shown, but the request must be in writing and by affidavit unless the adverse party consents (Appendix D; here there was no written request, no affidavit, and no consent, see

Appendix B, p. 17). Missouri courts have held, consistently, that "acts of the trial judge in controlling his docket and the progress of litigation and in the granting or denying of continuances are discretionary." *State ex rel. Schaper* v. *Stassie*, 487 S.W.2d 49 (1972); *Searles* v. *Searles*, 495 S.W.2d 759 (1973); *Krieber* v. *Krieber*, 420 S.W.2d 326 (1967). The absence of defendant's counsel, in and of itself, does not compel continuance, *Clinton* v. *Clinton*, 444 S.W.2d 677 (1969); *Carr* v. *Carr*, 308 S.W.2d 357 (1957). This allegation presents no federal question at all, as there was both notice and an opportunity for the appellant to be heard.

The Questions of Due Process Violations Were Not Properly Raised or Decided by the Courts Below

Appellant has invoked the jurisdiction of this Court by tailoring his allegations of due process violations to fit within 28 U.S.C. §1257 (2) and/or (3). Namely, that the highest court of Missouri, in which a decision could be had, upheld the constitutionality of a state statute or rule challenged by appellant. Appellant states at page 6 of his Jurisdictional Statement that the issues raised here (the unconstitutionality of Rule 61.01, Missouri Rules of Civil Procedure, and Rule F.01 of the Special Rules of the Missouri Court of Appeals, Kansas City District), were "raised and denied" in the Missouri courts. The issues were allegedly raised in appellant's Motion for Rehearing and Application to Transfer From Court of Appeals to the Supreme Court, filed March 18, 1975 (Jurisdictional Statement, Appendix D, pp. 22-26), but an examination of that motion reveals otherwise. Considered individually, the following reflects the extent to which appellant "raised" the issues herein below:

RE: Rule F.01

Paragraph 1 of the above-mentioned Motion for Rehearing and Transfer states: "Rule F.01 provides that reasonable notice be given the parties prior to the dismissal. There was no notice given in this case and this court should set the matter for rehearing" (Jurisdictional Statement, Appendix D). That is all; there is nothing more. Appellant goes on to argue alternate theories under the facts and Missouri law, but to say that the bare recitation quoted above "raised" the question of the constitutionality of Rule F.01, requires more imagination than this Court should interject.

RE: Rule 61.01

The Rule is not mentioned, cited, discussed or even alluded to anywhere in the Motion for Rehearing and Transfer. Nor does it appear in Appellant's Brief on the original appeal to the Missouri Court of Appeals. Appellee respectfully suggests that it would be extraordinarily difficult for this Court to accept this appeal in light of the restraints placed on its jurisdiction by 28 U.S.C. §1257.

In *Cardinale* v. *Louisiana,* 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969), Justice White's opinion for this Court stated both the law and the reasoning that should control in this case:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368, 9 L.Ed. 458 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344, 3 L.Ed. 120 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, Sec. 25, 1 Stat. 85,

> vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, [citations], and since. . . [citations omitted].
>
> [T]here are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, *O'Connor* v. *Ohio,* 385 U.S. 92, 87 S.Ct. 252, 17 L.Ed.2d 189 (1966), they should be given first opportunity to consider them."

Additional authority for appellee's position may be found in: *Murdock* v. *City of Memphis,* 20 Wall. 590, 22 L.Ed. 429 (1875); *Bailey* v. *Anderson,* 326 U.S. 203, 66 S.Ct. 66, 90 L.Ed. 3 (1945); *Street* v. *New York,* 394 U.S. 580, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969).

Appellant relies upon the cases of *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), and *Missouri ex rel. Missouri Ins. Co.* v. *Gehner,* 281 U.S. 313, 50 S.Ct. 326, 74 L.Ed. 870 (1930), to support the opposite view. However, neither of those cases should control as both are distinguishable on the facts. In *Brinkerhoff* the constitutional issues be-

fore this Court were in fact seasonably raised at first opportunity in the courts below (unlike the case at hand), and the plaintiff was denied an opportunity to be heard when the courts below, although having the power, denied plaintiff access to the judiciary because of plaintiff's failure to first seek an administrative remedy which was in fact never available (here appellant had actual notice and opportunity to be heard, and the appellate courts never had jurisdiction). In *Missouri Ins. Co.* the state court did indeed have an opportunity to consider the issue upon which the appeal to this Court was taken, as it was specifically raised by the relator at the first opportunity. Such is not the case here.

CONCLUSION

Appellee respectfully submits, therefore, that this appeal presents no federal question on the basis of the record itself, or alternatively, that any such question is not substantial in light of the state's compelling interest in maintaining its fundamental judicial procedure, and further, that the issues of challenge set before this Court were not raised or passed upon below. The appeal should be dismissed.

Respectfully submitted,

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APPENDIX A

Affidavit of Trial Counsel

AFFIDAVIT

STATE OF MISSOURI)
) ss.
COUNTY OF JACKSON)

Robert C. Jones, after first being duly sworn upon his oath, states that he is the attorney of record for the defendant in the above matter and that this cause has been set for hearing on numerous occasions, some of which the defendant was not ready for trial, some of which the plaintiff was not ready for trial and so announced, and some of which both parties were ready for trial but the Court could not hear it because of the large docket of contested cases; that there had been numerous motions and hearings on said motions and that on or about the 10th day of January, 1972, the last time a motion was scheduled, both parties announced that they were ready to hear the motion but that as a result of conferences between the parties, it appeared that the entire matter could be worked out without the necessity of a hearing or trial and that both parties so advised the Court, and that following this time several conferences were held between the attorneys and several written proposals and counter-proposals were exchanged between the attorneys in an effort to resolve the matter; that at some time prior thereto the parties had agreed to a February 15th trial date but that during this period of negotiations and following the parties' announcement to the Court that they believed the matter could be resolved without trial, the affiant addressed Miss Mary Wren, Domestic Relations

Clerk, under date of January 23rd that it appeared the matter could be resolved without trial and to remove it from the docket, and with a tacit understanding of the parties the matter would not be tried this affiant made arrangements to be out of town on February 15th.

That accordingly the matter was removed from the trial docket as a contested divorce for February 15th, but that on said day the attorney for the plaintiff appeared in Court, and although negotiations toward settlement of the matter was still in progress, requested this Court to enter a default judgment against the defendant when he was not in Court and when the affiant, his attorney of record, was out of town and neither parties could present the defense to the plaintiff's action.

The above statement is true to the best of my information, knowledge and belief.

.....

Affiant

Subscribed and sworn to before me this ..... day of February, 1973.

.....

Notary Public

My Commission Expires: .....

APPENDIX B

Transcript of Proceedings in Chambers and Initial Proceedings in Open Court (Feb. 15, 1973)

(Page 6, line 23 through page 14, line 5)

On Thursday, February 15, 1973, the following proceedings were had and entered of record:

(The following proceedings were had IN CHAMBERS and entered of record.)

THE COURT: This is the case of Godsy vs. Godsy?

MR. SIMMS: Yes, Your Honor.

THE COURT: Plaintiff is here by counsel and defendant is appearing by Jack L. Simms.

MR. SIMMS: Your Honor, I am Jack L. Simms, and I am appearing in this matter especially for Mr. Robert C. Jones, attorney of record in this case. It is Mr. Jones' case, I know absolutely nothing about it. It has been pending for quite sometime. It was imparted to me that there had been some sort of a settlement that had tentatively been accepted and that motions pertaining to the case were not argued on account of that; that immediately thereafter, Mr. Jones made arrangements to depart on a vacation and will return the first part of the week of the 19th, which I believe is Washington's birthday, and will be ready to try this case at any time thereafter.

I am requesting the Court at this time for a continuance of the case until Mr. Jones can return to handle and properly try the case. Mr. Jones has indicated to me in writing that he is the only one that is qualified, because of the background of the case to try it, and because of my physical condition, having just gotten out of the Veterans Hospital, with double pneumonia, I am not in condition, nor am I familiar enough with the file to try

the case, and I have been so instructed not to try cases by my personal physician. That is the record that I wish to make. We are talking about a matter of a few days. There is background in this case that I am not familiar with and I am requesting that the case be continued to be tried immediately upon return of Mr. Jones, the first part of the week.

MR. KRENSKY: Your Honor, the plaintiff opposes any application for continuance of the trial on the grounds that this case was set down for special hearing chosen by Mr. Jones. It was agreed upon by me at that time.

Mr. Jones stated that the day would be set aside, that there would be no further delay and that the matter would be disposed of at this time.

Previously, there has been six to eight continuances of this case over the past fourteen months. When this case was set, the Court further instructed the defendant to make certain child support payments and alimony payments and to return a car that he had taken that she had been previously using up until the time he took it. Since that time the man has paid nothing, has not returned the car and has told the plaintiff that he doesn't intend to pay anything. She will be an old woman before it is tried.

This very day the plaintiff has a banker under subpoena and the defendant telephoned Mr. Prouty and told him he didn't need to come to court because the matter wouldn't be heard and that he didn't need to worry about Mr. Krensky's subpoena because the matter would never be tried.

The settlement was a tentative settlement that was offered by the plaintiff and accepted by the defendant. Subsequently three weeks afterwards the defendant had not acted upon it and at that time Mr. Jones and I had a discussion as to when he would act upon it and I was

informed that it had fallen through even though it had been agreed upon.

Mr. Jones called Mary Wren and told her it was settled and to take it off the docket. I advised this court that the matter was not settled and should be left on the docket and sent a strongly worded letter to Mr. Jones to that effect.

We have made further attempts to get child support but there was no success and we have had no success in getting the automobile returned.

Last Thursday I received a letter from Mr. Jones stating he hoped I would not object to a continuance, that he was going on his winter vacation to Hawaii and I wrote him a letter and hand carried it to the office and it was placed in Mr. Jones' hands. He read it and made no comment and my letter said that I did not understand and opposed a continuance and that I would appear in court ready to try the matter and would urge the Court to allow us to try the matter.

I talked to Gene McDaniel on Monday and was informed by him that Mr. Jones had left town and I told Gene we would be here prepared to try the case.

This is not a statutory ground to continue a case because a lawyer is on vacation and from a personal standpoint I would not oppose a continuance for such reason had this matter not been delayed so many times in the past and I don't know when the plans materialized to take this vacation. The letter Mr. Jones sent me saying he was going on vacation was dated the 2nd and mailed on the 7th of February and I asked him about it; that we may have been able to advance the case up a week and Mr. Jones said, "Well, that is the way it happens in this office. Things don't get mailed out promptly."

The plaintiff is suffering from want of money. She has received second and third notice of utilities being

shut off, she is without a car, she owes the bank, the baby-sitter, she has borrowed money to live on. This matter will not get any better until it is tried.

MR. SIMMS: For the record, may I ask you a question based upon what we have talked about heretofore, and for my own self-satisfaction, had it been myself who requested this continuance and told you it would be tried the first part of next week, would you oppose that?

MR. KRENSKY: No.

MR. SIMMS: I believe that is all I have for the record, Your Honor.

THE COURT: What was your offer again?

MR. SIMMS: I asked him if it had been myself who requested the continuance and that it would be tried the first part of next week, would he oppose the continuance, and he said, "No."

MR. KRENSKY: I would take Jack's word if he said he would try this case next week or next month.

THE COURT: Gentlemen, the Court feels this matter should be tried. The record does reflect that it has been continued a number of times at the request of both parties. The case came from Independence on the 5th of December. The Court recalls the conference in chambers with the attorneys and at the bench where both the plaintiff and defendant were present and it was my understanding the defendant would bring up to date his child support payments, which at that time amounted to something like $1500.00. The order was made in court 1/29/72. He has not yet done it and he also promised he would share some of these automobiles. He seems to me to be in contempt of the court. I think we should go ahead with the case if Mr. Krensky is demanding that it be heard today.

I am not blaming you, Mr. Simms. You can tell the others what we are going to do.

The Court will deny the request. I am going to hear it in the absence of the defendant. I don't believe he wants to have it heard. He isn't in good faith at all here and, as I understand it, the fellow is in a position to pay.

Mr. Hunsucker, there is a motion for your fees, isn't there?

MR. HUNSUCKER: Yes, Your Honor, the temporary allowances was heard before Judge Randall and he made the child support and alimony allowances.

MR. SIMMS: Very well. Thank you, Your Honor.

BE IT REMEMBERED that heretofore on Thursday, February 15, 1973, the above cause came on regularly for hearing before the Honorable LEWIS W. CLYMER, Judge of Division No. 8 of the Circuit Court of Jackson County, Missouri, sitting as Division "B" of Domestic Relations.

The Plaintiff appeared in person and was represented by her attorney, Mr. Frank Krensky.

WHEREUPON, the following proceedings were had and entered of record:

THE COURT: This is the case of Godsy vs. Godsy, and the Court heretofore has allowed a record to be made in chambers at which time Mr. Jack Simms appeared on behalf of Mr. Jones, who is counsel of record for the defendant, and at that time requested a continuance. The file reflects, of course, that Mr. Jones is not in the city and a letter is in here from him where he says he will be away and couldn't be here and that he is under the impression that a settlement would be reached.

On the other hand, Mr. Krensky says that is not so. The Court is not satisfied with the handling of this. It was set especially at this time at the agreement of both counsel and I expected him to be here. We excused Mr. Simms because of his illness and his unfamiliarity with

the case and the request has been denied and the Court will proceed with hearing this case with the defendant not being present nor counsel being present.

MR. KRENSKY: Your Honor, at this time, there are some preliminary motions pending before the Court, can we dispose of them at this time?

THE COURT: All right.

APPENDIX C

Rule 65.01, Missouri Rules of Civil Procedure

65.01 Court May Continue a Civil Action to a Fixed Day

For good cause shown, the court may continue a civil action to a fixed day, or to a date for trial to be set thereafter. Every continuance granted on the application of a party may be at the cost of such party, if so ordered by the court.

APPENDIX D

Rule 65.03, Missouri Rules of Civil Procedure

65.03 Application for Continuance, How Made

An application for a continuance shall be made by a written motion accompanied by the affidavit of the applicant or some other credible person setting forth the facts upon which the application is based, unless the adverse party consents that the application for continuance may be made orally.